Supreme Court, U.S.
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No.

# In the
# Supreme Court of the United States

**ARTURO OROZCO-VASQUEZ,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Does a reviewing court have a responsibility, under 18 U.S.C. § 3742 (e) or other applicable standards of review, to review a ~~sentencing~~ court's factual findings for clear error or may it recast those erroneous factual findings as "judicial observations that explain conclusions about sentencing factors" and then employ *Booker's* reasonableness review to affirm a sentence that was 42 months above the advisory guideline sentence?

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, for which review is sought, is United States vs. Arturo Orozco-Vasquez, No. 05-3920, 469 F. 3d 1101 (7th Cir. December 6, 2006) (Appendix A). The district court judgment sought to be reversed is United States v. Arturo Orozco-Vasquez, No. 05 CR 87 (E.D. Wisc. September 26, 2006 and October 5, 2006)

## JURISDICTION

Judgment was rendered in the United States Court of Appeals for the Seventh Circuit on December 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 3742(e) (relevant portions):

> Upon review of the record, the court of appeals shall determine whether the sentence . . .
>
> . . . The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous . . .

## STATEMENT OF THE CASE

On June 13, 2000, Arturo Orozco-Vasquez plead guilty to Count 1 of the indictment, alien in possession of a firearm, in violation of 18 U.S.C. § 922 (g)(5); and Count 3,

illegal re-entry in violation of 8 U.S.C. § 1326 (a). The defendant's plea was pursuant to a written plea agreement. On June 14, 2005, a jury convicted the defendant of Count 2, possession of more than 500 grams of cocaine with intent to deliver, in violation of 21 U.S.C. § 841 (a) (1) and (b)(1)(B) and 18 U.S.C. § 2. The Honorable Judge Rudolph T. Randa presided at the trial and over the plea.

On September 26, 2005, the Honorable Judge Rudolph T. Randa sentenced the defendant to 63 months on Count 1; 120 months on Count 2; and 24 months on Count 3, with the sentences on Count 1 and 3 to run concurrent to the sentence on Count 2. On December 6, 2006, the United States Court of Appeals affirmed the convictions and sentence.

### A. Statement of Facts.

On November 23, 2004, at approximately 11:00 p.m., Milwaukee Police Officer Todd Bohlen and several other officers arrived at 3122 South 13th Street, Milwaukee, Wisconsin to investigate an informant's tip that the residence housed a drug dealing operation. The informant had told the police that Arturo Orozco-Vasquez would be at 3122 South 13th Street and that drug trafficking was occurring at the residence. Bohlen knew Mr. Orozco-Vasquez as Reynaldo Elizardo, and that under that name, there was a warrant for the defendant's arrest. The police eventually made a warrantless entry into the residence.[1] Upon entry, Bohlen could hear the sound of water running loudly. After walking down a hallway, Bohlen saw the defendant, Mr. Orozco-Vasquez, exit a bathroom, with his hands up. Bohlen could see

[1] The legality of the entry was not an issue before the Appellate Court.

that Mr. Orozco-Vasquez's arms, hands and chest were soaking wet.

Bohlen secured the defendant, placing him under arrest. Bohlen went into the bathroom and found the hot water tap of the bath tub running at full capacity. The tub drain was open. Bohlen admitted that his police report did not state that he found hot water running. Bohlen claimed to smell a strong odor of cocaine in the bathroom and apartment. He also gave an opinion that he believed that the defendant was using the hot water in the tub to flush drugs down the drain. The defendant objected to that opinion. Bohlen had previously testified that, in his extensive drug investigation background, persons wishing to destroy cocaine used hot water to dissolve it.

Bohlen also searched a bedroom located inside the apartment, just across from the bathroom. It was the only room with access, via a spiral staircase, to the attic. Bohlen went to the attic and found what he described to be a kilo press and a blue book bag. He also noticed an open window which was facing in the direction where officers had observed someone throwing the cocaine onto nearby roofs. In the bedroom itself, officers recovered a functional scale, two bottles of inositol (one was a quarter full; the other was empty), baggies, a blue strainer, plastic wrap, dryer sheets, and duct tape. The officers also recovered a knife with cocaine residue and a quarter kilo of cocaine inside the bedroom. Bohlen had previously testified that, in his experience, inositol was often used as a mixing agent in cocaine to "stretch" its volume, and thus its economic value to the dealer. Bohlen also agreed that the bedroom belonged to Fernando Campos-Ruiz, another individual found at the residence. The officers entering the apartment had found Campos-Ruiz in the bedroom, with the quarter kilo of cocaine at his feet. At the time of arrest, a different bedroom was occupied by another individual, one Diego Moreno.

Bohlen testified that, in all, the police recovered four packages containing cocaine, each being approximately 250 grams. Bohlen also testified concerning the workings of the kilo press.[2] Additionally, Bohlen testified to a home experiment in which he engaged. He testified that he put a t-shirt on, got down on his knees next to, or in front of his tub with the water running and pressed his hands on the drain to simulate an effort to stuff cocaine down the drain of the tub. The defense objected to this testimony, and the district court overruled the objection. This example of the scientific method in action produced, according to Bohlen, a wet t-shirt. Officer Douglas Knueppel, a latent fingerprint examiner for the Milwaukee police department, identified the defendant's fingerprint on the scale and on the inositol bottles. The prints recovered from the items did not match Diego Moreno or Fernando Campos-Ruiz, the other individuals found in the apartment. The Government then rested. The defendant did not testify and the defense put on no further evidence. The district court denied the defendant's motion for a directed finding. The jury found the defendant guilty on the drug count.

The district court sentenced the defendant to 120 months on Count 2, the drug count. Pursuant to the Guideline calculation, which the district court accepted as correct, the defendant faced 63-78 months for the drug count, as a category I offender. The Government filed and argued an upward departure motion, requesting that the Court sentence the defendant above the applicable sentencing guideline.

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[2] The testimony concerning the workings of the press, and its prior use, were consistent with Bohlen's testimony at sentencing. We will not repeat them, here, but set them out in that section of the factual statement, supra.

To support its allegations, the Government again called Milwaukee Police Officer Todd Bohlen. Bohlen testified that he is assigned to the Police Department's Gang Squad on the "Mexican Posse," a Milwaukee street gang. Bohlen testified that he reviewed the reports about a 2000 stop where Reynaldo Elizardo, a.k.a. the defendant, was found with a gun in his shoe. Bohlen testified that at the time of the 2000 arrest, the defendant was with Humberto Rongell and Ario Rocay, two known Mexican Posse members. Bohlen testified that the defendant was convicted of a state offense for possession of the gun and sentenced to six months under the Elizardo name. The defendant, Bohlen testified, never served a day of that sentence. Under cross, Bohlen agreed that he did not really know if the defendant served the sentence. The defense then agreed that Bohlen was an expert on drug trafficking.

Bohlen then testified about the cocaine press found in the attic when the police arrested the defendant. Bohlen described the press as "several plates of steel with a long drill rod with nuts on it, angle iron plates, and a bottle jack with jack handles along with other items used to press cocaine into the brick form." Bohlen examined the "press" and the "contact surfaces where the top of the bottle jack had a square and semi-square pattern on it. How it (sic) contacted the metal plates as part of the pressing procedure." Bohlen told the Court that he had seen a similar press in the past and had previously testified about one in relation to large scale drug operations. Bohlen testified that his examination of the press in this case showed certain depression marks on the metal plates that formed the top of the press. The marks, Bohlen opined, were caused by contact between the jack and the metal plate. The marks would be made when sufficient force was applied to leave the depressions. The contact point of the jack, or the jack head, had several rectangular shaped protrusions on it; contained in a

circular area, with a diameter of 1 ½ inches. The metal plate had markings, Bohlen claimed, from the jack head coming into contact with the plate. The fact that the imprints were on two different areas on the plate were the result, according to Bohlen, of the plate being put in a different position when the press was used on various occasions.

The press could make a one kilogram or a half kilogram block of cocaine. Bohlen had no way to determine if the press was used for half or whole blocks. Bohlen testified that his examination of the plates revealed, in his "conservative estimate" that it was used nine times. Bohlen broke that conclusion down to four on one portion of the plates, and five on another. Bohlen explained that the jack head was circular and filed with rectangular protrusions. By looking at the depressions, Bohlen could see nine "complete" depressions. The depression marks showed that someone had used the press at least nine times. If that person made half kilos each of those nine times, then they pressed four- and-a-half kilograms of cocaine. Bohlen agreed that he did not know whether the defendant had made the nine impressions. Bohlen also agreed that he could not testify that the defendant even used the press. Bohlen further agreed that he was assuming that the nine different impressions came from nine separate half kilos of cocaine, rather than from multiple presses of a single half kilo.

Bohlen testified that a person does not become a drug dealer in half to one kilo amounts without having previously sold other large amounts of cocaine. The Government then asked the Court to consider the sentencing hearing of a co-defendant, Campos-Ruiz. This request was in response to the defendant's objection concerning the Government's attempt to ask Bohlen if Campos-Ruiz was afraid to testify against the defendant. The district

court ruled that it could consider the presentence report for Campos-Ruiz's sentencing.

Bohlen also testified, concerning the defendant's assertion, that he had not been a member of the Mexican Posse since 1997. Bohlen testified that during the 2000 arrest, the defendant was arrested with members of the Posse. Pictures obtained by Bohlen show the defendant displaying Posse gang signs, with others, on November 29, 2003. The other photos were not dated. The Government introduced the defendant's 1996 booking photo. Bohlen then testified that when Bohlen first met the defendant in 1997, he (the defendant) had hair similar to that depicted in the 1996 photo. Bohlen testified that in 1998, the defendant had shorter hair. Bohlen, looking at the "maturing on his face, the hairstyle, the height and weight (sic) . . ." concluded that the pictures were all taken after 1998.

Bohlen described the individuals in the photos as "representing" their gang, the Mexican Posse, by giving certain hand signals. The defendant is identified in some of the pictures as displaying gang hand gestures. Bohlen testified that, aside from the fact that the defendant associated with Mexican Posse members, he based his conclusion that the defendant was a high ranking gang member on interviews with other Posse members. Bohlen agreed that he could not turn those interviews over to the defense counsel because they involved an on-going investigation. Bohlen testified that, in 1997, he had 5 or 6 contacts with the defendant. Bohlen thought his "memo book" might reflect the contacts but he did not bring the book to court.

The Government also referred to three phone calls that it contended showed the defendant was involved in on-going large scale drug operations. The Government appeared to be referring to a September 12, 2005 memo. The Government provided no testimony, such as a law enforcement officer with relevant experience and expertise

in discerning the meaning of such conversations, to explain the meaning of the certain alleged "code" words. Rather, the Government submitted a mem ~ from Milwaukee Police Officer Rudolo Gomez regarding a "summary" of the calls. Trial counsel objected to the Court's reliance on the tapes, arguing that the Government provided only a "brief opportunity" to hear the calls and that the tapes were in Spanish and never turned over to the defendant. Trial counsel objected on the grounds that the summary of the tape recordings refer only to "possible" or "possibly" being related to narcotics or a "probable" reference to money.

The Government also argued that the Court should consider the State conviction for C.C.W. (possession of the gun in the shoe) despite the fact that it agreed that it should not be considered under the Guidelines. The Government's main contention was over whether the defendant served his six month sentence for the charge. The Assistant United States Attorney stated that she was "not sure if he did or didn't" serve the sentence, but argued that it was a sentence that "he totally avoided." The Government argued that because the defendant used a fictitious name, law enforcement could not determine whether the defendant was illegal, therefore allowing him to avoid a State felony charge. The Government also asked the Court to consider the fact that the defendant was an illegal alien: "the fact that he is an illegal alien is something that the sentencing guidelines do not take into consideration. And I think the Court should take those into consideration. That is, that this Defendant not only is an illegal alien from Mexico, but appears to be going back and forth to get drugs from Mexico and to distribute drugs."

The Government also claimed that the defendant lied to the Court when he "tried to deliberately portray himself as someone who left the gang, as someone who has never done—involved himself at all in drugs . . ." The Govern-

ment argued that the tapes proved that the defendant was lying about his involvement in drugs. The defense argued that there was no evidence that the defendant owned or ever used the kilo press. The Government, the defense contended, never proved that the defendant owned or stayed at the house where the press was recovered.

**B. How the question was presented.**

The district court then began its sentencing analysis, indicating that it denied the Government's objection concerning the sentencing calculation, pursuant to the Guidelines. The Court then articulated the § 3553 (a)(1) standard to "impose a sentence sufficient but not greater than necessary." The Court then, while acknowledging that "the nature and circumstances of the offense" are "already taken into account by the sentencing guidelines" stated that it "has to look at (the nature and circumstances of the offenses) in light of the Government's motion a little more carefully." A more fundamental consideration, the Court stated, was the history and characteristics of the defendant. Accordingly, "the Court is free to deviate from the sentencing guidelines if it finds a reasonable basis for doing so . . ."

The district court found that drugs and gangs are dangerous and destroy communities, including the south side neighborhood where the judge, at one time, played football. The Court found that the defendant is "legally a drug dealer." The Court found that the defendant was arrested in a "drug house." The Court credited the statements of Campo Ruiz, that he saw the defendant come down from the attic and, just before, heard a "big clunk," a sound the judge found to be the press dropping. The Court then stated "I am going to make a finding that the

drugs that Mr. Campos Ruiz saw you take into the bathroom are being flushed down the bathtub."

The Court concluded that, looking at the denial of culpability in this case, as well as the defendant's history, that he was "a liar." The defendant was also a "scofflaw" for returning to the United States after being removed, and using a false identity. The Court found that by using the false identity when the defendant was arrested on the gun charges, he was lying to the police.

The Court found that the defendant's statement that he quit the gang, after being shot in '97, as well as the defendant's explanation that the shooting was over a stolen car dispute with a neighbor, was a lie. The Court concluded that "I can't believe that. The inference that I would draw is that you were a member of a gang and some other gang shot you in the head in some kind of dispute."

The Court looked to the photos, stating " . . . I have seen a lot of these photos . . . I have seen a lot of gang photos, okay . . . this is a gang." The Court credited Officer Bohlen's conclusion that the defendant had aged in the alleged gang photos, beyond the years of his 1996 booking photo. The 2000 arrest with known gang members corroborated this conclusion, according to the Court. The Court found the defendant to be an "associate member" of the gang.

The Court then considered the tapes stating that "I have seen a lot of tapes, a lot of drug deals, a lot of conversations. Yeah. Did you pick up any six shirts today? As if guys would call up and ask if they're going to pick up six shirts. Or did you pick up my golf balls?. . . But this is all drug talk. It's like a language all its own. It's clearly identifiable."

Under the deterrent effect of the sentencing, as well as protection, the Court found that the defendant could not

be deterred. The Court further found that the defendant had not served the sentence for his State charge of possession of a weapon. The Court found that a long sentence is required because the defendant has a history of committing a crime, serving a shorter sentence, being deported, and returning to commit other crimes.

The Court concluded as follows: "[w]hen I was sitting on the State bench in the old days I had the discretion to sentence to the maximum. And if I wasn't constrained by the sentencing guidelines, you'd get a much longer sentence than I am going to impose. And I am going to sentence you to 120 months. I think that's a reasonable sentence the way the Seventh Circuit would interpret it, given all that I said."

The Seventh Circuit affirmed the sentence, holding that the defendant's attack on the district court's fact finding was "misplaced. There is a difference between formal factual findings and judicial observations that explain conclusions about sentencing factors, and Orozco-Vasquez has confused the two." (Appx. pg. 38) The Court of Appeals acknowledged that sentencing related factual findings that are clearly erroneous cannot stand. (Appx. pg. 43-44) The Court made a distinction, however, between "explicit" and "formal" fact finding and a "fact-based statement a Judge makes at sentencing" that is more akin to "observations and assessments that form the basis of the Judge's consideration of the § 3553 (a) sentencing factors." (Appx. pg. 43-44) The Court, citing its prior decision in *U.S. v. Dean,* 414 F.3d 725, 729-30 (7th Cir. 2005) held that "only where a particular fact is contested and 'decisive to the choice of sentence' must there be explicit fact-finding to support the judge's exercise of sentencing discretion." (Appx. pg. 44) Consideration of the factors, and "observations about such factors" need only be reasonable. (Id.)

Despite the district court's explicit decision to make findings that were decisive to the increased sentence, the Seventh Circuit recast the findings as "observations" and affirmed the sentence. (Appx. pg. 46-48)

## REASONS FOR GRANTING THE WRIT

### I. THE SEVENTH CIRCUIT'S USE OF "REASONABLENESS" REVIEW TO AFFIRM THE DEFENDANT'S SENTENCE, DESPITE THE DISTRICT COURT'S RELIANCE ON UNSUPPORTED FACTUAL FINDINGS, PRECLUDED MEANINGFUL REVIEW OF THE DEFENDANT'S SENTENCE.

#### A. Argument summary.

In *Booker*, Justice Scalia warned that the newly imposed "reasonableness" review of federal sentences might "be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion(.)" *Booker*, 543 U.S. at 313 (Scalia, J., dissenting) In the present case the Seventh Circuit has utilized "reasonableness" review to change the district court's clearly erroneous factual findings into "all the right things" by characterizing the findings as the district court's "observations" of the relevant § 3553 factors. *Booker* did not mandate the application of the reasonableness review standard to sentencing related factual determinations that do not result in a sentence above the statutory maximum. Application of the more stringent clear error standard is required to insure accuracy in the application of the § 3553 factors and hence, sentencing.

The district court sentenced the defendant to 120 months – 42 months in excess of the advisory guideline range -- by relying on "facts" that were unsupported by

the record. This district court made specific findings of fact, making it clear that the factual findings were the engine driving the increased sentence. The Seventh Circuit refused to conduct any meaningful review of these "findings." Rather, it mischaracterized the factual findings as "observations" related to the sentencing court's obligation to arrive at a sentence by looking to the factors set out in 18 U.S.C. § 3553(a). The Seventh Circuit then concluded that the defendant's sentence was "reasonable" pursuant to *Booker*'s admonishment that the "reasonableness" of a sentence is the touchstone of its appellate review.

### B. Relevant Legal Framework.

The *Booker* decision certainly changed how a district court must arrive at a particular sentence. It also changed how reviewing courts insure that a given sentence comports with factors mandated by 18 U.S.C. § 3553. This Court is currently considering whether reasonableness review, with the appellate courts' post-*Booker* presumption that all Guideline sentences are reasonable, violates *Booker's* admonishment that a district court consider the Guideline sentence as one factor in arriving at a sentence that is "sufficient, but not greater than necessary, to comply with the purposes set forth" in the relevant provisions of § 3553. *Claiborne v. United States*, 127 S. Ct. 551, 166 L. Ed. 2d 406 (cert. granted, Nov. 3, 2006); and *Rita v. United States*, 127 S. Ct. 551, 166 L. Ed. 2d 406 (cert. granted, Nov. 3, 2006).

The question here is whether reasonableness review has replaced the requirement that a reviewing court review factual determinations that affect a sentence determination for clear error, whether the clear error standard has its basis in 18 U.S.C. § 3742(e) or some other source. The Third Circuit has recently rejected an ap-

proach that would replace clear error review with reasonableness review, at least as that review relates to factual determinations necessary to Guideline determinations. *U.S. v. Grier*, 475 F.3d 556 (3rd Cir. 2007)

The Seventh Circuit's opinion in this case is in conflict with *Grier*, despite its lip service to clear error review. There is no question that a sentencing court must, as *Booker* mandates, consider the factors set out in 18 U.S.C. § 3553 in fashioning a sentence. *U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). But it is also true that "clear error" review survived *Booker*. Although this Court excised provisions of 18 U.S.C. § 3742(e) that made the Guidelines mandatory, it is not altogether clear whether this Court left untouched the statutory provision that requires a reviewing court to "accept the findings of fact of the district court unless they are clearly erroneous . . ." *Booker*, 543 U.S. at 271 (Appendix to *Booker* opinion, setting out 18 U.S.C. § 3742(e)). If that provision of the statute is not in effect, the Circuits are, for the most part, maintaining "clear error" review of sentencing related factual determinations. *Grier*, 475 F.3d at 569 (collecting cases) As articulated by the *Grier* Court, the application of the clear error standard survived *Booker*. *Grier*, 475 F.3d at 570, 572 (rejecting reasonableness review for sentencing related fact finding and maintaining the clear error approach, holding that "[t]he opinion in *Booker* did not alter the burden of proof or the standard of review for findings of fact relevant to sentencing" while acknowledging that, at least for factual finding related to the Guideline calculation "[d]espite the excision of subsection (e) of 18 U.S.C. § 3742 (by this Court in *Booker*), this Court will continue to review factual findings relevant to the Guidelines for clear error and to exercise plenary review over a district court's interpretation of the Guidelines")

There is a meaningful distinction between "clear error" review and "reasonableness" review that the Seventh Circuit has glossed over in its decision in this case. As the *Grier* Court reasoned, to "review findings of the district court for "reasonableness," is also unfeasible. The Supreme Court explained in *Booker* that review for "reasonableness" is meant to assess the ultimate sentence imposed, to determine whether the sentencing judge gave meaningful consideration to the factors of 18 U.S.C. § 3553(a). (*Booker,)* 543 U.S. at 260-61. Nothing in *Booker* suggests that the same standard is to be applied to evaluate the quantum of evidence offered in support of a particular finding of fact, even one that played a role in the court's final sentence. Indeed, application of the "reasonableness" standard, with its broad focus on policy goals, would be incompatible with review of factual findings." *Grier*, 475 F.3d at 569

Reasonableness review also has been considered more deferential than clear error review, making it particularly unsuitable for reviewing factual findings. More concretely, a reviewing court may uphold something as "reasonable" even if it concluded that the issue was incorrectly or wrongly decided. *Lockyer v. Andrade,* 538 U.S. 63 (2003) (in the context of federal habeas appellate review of a state court's application of federal precedent "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness") citing *Williams v. Taylor*, 529 U.S. 362, 412, (2000); *Bell v. Cone,* 535 U.S. 685, 698 (2002). As for clear error, a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v.*

*Bessemer City*, 470 U.S. 564 (1985) quoting *U.S. v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

A more rigorous standard of review for sentencing related fact finding is necessary to insure that a district court's post-*Booker* sentencing discretion is constrained by consideration of sufficiently established facts. A district court is not prevented, by *Booker* or the Sixth Amendment, from making factual findings that may increase a defendant's sentence, just so long as those findings do not increase the sentence over the authorized statutory maximum. But this discretion must be moored to both the relevant § 3553 factors and to accurate factual finding. The role of fact finding in sentencing was articulated by the Seventh Circuit in *Dean*:

> Explicit fact finding *is* required, however, if, though only if, contested facts are material to the judge's sentencing decision. A judge who thinks that a particular contested characteristic of a defendant may be decisive to the choice of sentence, such as the defendant's mental or emotional state, must resolve the factual issue in the usual way, that is, by making findings on the basis of evidence, just as he would have to do in applying the sentencing guidelines if, as in the present case, the calculation of the guidelines sentence depends on the resolution of a factual dispute.
>
> This does not mean trial by jury, proof beyond a reasonable doubt, consideration limited to evidence that satisfies the requirements of admissibility that are found in the Federal Rules of Evidence, or any other such formalities. (citations omitted) Only when factual determinations *require* a particular sentence does the Sixth Amendment come into play, imposing formalities on factual determinations (other than criminal history) that influence sentence length.

*Dean*, 414 F.3d at 730; *U.S. v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005); see also *U.S. v. Johnson*, 227 F.3d 807, 813 (7th Cir. 2000) Despite Seventh Circuit's focus, in *Dean*, on the district court's consideration of what factual determinations are relevant to sentencing, in this opinion it has abandoned that focus for an approach that merely asks if the district court considered the appropriate § 3553 factors. Such an approach is insufficient to insure that sentences are based on accurate factual findings. The Seventh Circuit's use of reasonableness review in this case is in conflict with the traditional approach of appellate courts in reviewing sentencing related factual determinations, as well as the approach of other Circuits have taken on the question.

### C. Reasons to grant the writ.

There are several reasons why this Court should reject the Seventh Circuit's approach and grant the writ. First and foremost, this Court should correct the error in this case, whereby the defendant received an additional 42 months of imprisonment based on clearly erroneous factual findings at sentencing. Furthermore, this Court should clarify the scope of reasonableness review for federal sentences as it is applied to factual determinations that increase a defendant's sentence beyond the advisory guideline level. Nothing in *Booker* modified a reviewing court's obligation to review sentencing related factual determinations for clear error where those determinations merely support a district court decision to sentence within the applicable statutory range. This Court should make it clear that reasonableness review is an overarching standard of review intended to give deference to a district court's reasons for a particular sentence; it is not meant to replace the less deferential standard of clear

error for reviewing the factual determinations that underpin those reasons.

This Court should also insure that appellate courts are exercising meaningful review of the facts that a district court relies on to arrive at a particular sentence. Reasonableness review should not be a tool appellate courts use to recast a district court's flawed factual determinations into "observations" related to the § 3553 factors. The district court made findings of fact, albeit in error, that it considered to be decisive to increasing the defendant's sentence. The Seventh Circuit's obligation, pursuant to either 18 U.S.C. § 3742 (e) or the traditional standard applicable to reviewing sentencing related factual determinations, was to review these findings based on the sentencing related evidence before the district court. When it recasts the errors, rather than remands with instructions to the district court to make proper findings, it merely lays the groundwork for similar errors in future cases.

Finally, reviewing factual determinations for clear error is a statutory mandate that serves the important purpose of insuring that the evidence relied on at sentencing has sufficient indicia of reliability to support its probable accuracy. Reliable fact finding at sentencing insures that sentencing disparities are based on real, significant, and relevant differences among otherwise similarly situated defendants. The Seventh Circuit's opinion in this case fails to properly address all of these considerations.

### D. The sentencing errors in this case.

It is clear that the Seventh Circuit did not employ a clear error standard when reviewing the factual findings of the district court. Rather, it applied a reasonableness standard. Despite the district court's specific factual findings (Campos Ruiz saw the defendant bring cocaine into the

bathroom; defendant lied about the way he was shot in 1997; that the tape contained coded drug language; defendant did not serve his State sentence) the Seventh Circuit found them to be reasonable observations related to the district court's § 3553 analysis. The district court was, however, making factual findings that were clearly erroneous. The district court relied on a memorandum from Milwaukee Police Officer Gomez where Gomez claimed that the Defendant was heard making telephone calls that "possibly" referenced drug deals. Something is not more likely true than not if it is only one of many possibilities. Moreover, even granting that the district court has heard evidence of what constitutes coded drug language in other cases, reliance on that experience is improper when the law enforcement determines that the statements only "possibly" relate to drugs. It is improper for a district court to conclude that a defendant's knowledge of drug slang is indicative of prior dealing by that defendant. *U.S. v. Harrison,* 431 F. 3d 1007 (7th Cir. 2005). With such thin evidence that the coded language was referencing drugs, it was improper to conclude that the statements were proof of the defendant's drug dealing.

The district court also made a finding that the defendant, who had told probation that he had been a victim of a shooting in 1997, was lying about the circumstances that led to the shooting. The district court based this on the defendant's gang membership, and inferred that the shooting was gang related. The district court clearly erred, as mere membership in a gang does not turn every criminal act connected to the defendant into a gang related crime. The Seventh Circuit's conclusion that it was reasonable for the district court to conclude that the defendant was a liar or a gang member generally misses the point: the district court chose specific facts upon which it relied in concluding that the defendant had lied.

A conclusion based on erroneous fact finding is equally erroneous.

Next, the district court stated "I am going to make a finding that the drugs that Mr. Campos Ruiz saw you take into the bathroom are being flushed down the bathtub." Although the Court did not expressly state it, this is a reference to the PSR, where Campos-Ruiz states he sees the defendant go into the bathroom and come out wet. But Mr. Campos-Ruiz did not say that he saw the defendant take the drugs into the bathroom, at least according to the PSR. Rather, Campos-Ruiz stated that he saw the defendant dump some cocaine in a bag. Campos then saw the defendant enter the bedroom and come out wet. Campos-Ruiz simply does not say that he saw the defendant enter the bathroom with the cocaine. The district court's conclusion that he did is clearly erroneous.

The district court also made a finding that the defendant failed to serve a six month work release sentence for the state gun charge. The PSR contained no finding that the defendant did not serve the sentence. (PSR, pg. 8, ¶ 53) Both the Government and Officer Bohlen admitted that they did not know if the defendant actually served the sentence. The district court's finding was clearly erroneous, as it was not based on any credible evidence that the defendant did not complete the state sentence.

All of these findings were critical to the district court's sentence. As there were factual determinations critical to the defendant's sentence that were clearly erroneous, the Seventh Circuit's decision to review them for reasonableness was in error.

## CONCLUSION

This Court should grant the writ to correct the error in this case. It should also grant the writ to clarify that reasonableness review is not a substitute for clear error review when the issue is sentencing related factual determinations. Considerations of sentencing accuracy, justified sentencing disparity, and meaningful appellate review of sentencing all favor the granting of the writ.

Respectfully Submitted,

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*Counsel for Petitioner*

THE COURT: As the Court indicated at the start of the proceedings, it looks at the sentencing guidelines. It found that the sentencing guidelines were correctly applied. Denied the Government's motion relative to its objection to the sentencing guidelines, and has now heard the sentencing arguments, including the Government's argument for an upward departure.

The Court having done the first step now has to, as it also indicated, impose a sentence sufficient but not greater than necessary. And that's the language out of 3553(a) (1). And the Court does that to—or when it does it, takes into account factors that it indicated also before the start of the sentence that it was precluded from taking into account before, and that is, first and foremost, the nature and circumstances of the offense, which is already taken into account by the sentencing guidelines, but which the Court has to look at in light of the Government's motion a little more carefully.

But secondly, and probably more fundamentally, the history and characteristics of the Defendant. And this has been a factor that has been argued before this Court since post-Booker, and as the Court has indicated it cuts both ways. So the Court is free to deviate from the sentencing guidelines if it finds a reasonable basis for doing so. And that is the hallmark of any legitimate sentence, and that is reasonableness, according to the Supreme Court.

So the other factors that have to be taken into account under 3553 are not only the history and characteristics of the Defendant, but taking those into account, the need for the sentence to reflect the seriousness of the offense, the deterrent effect, the protection of the public. And then there is another factor that 3553 mentions, and it's also now been more freely argued, since Booker, and that is the Defendant's medical, educational, vocational, and other—what the Statute calls correctional treatment. And

often times that last factor, last standard is used to counter what the sentencing guidelines said could not be utilized, and that is—or those are factors that would fall without the heartland of cases relative to someone's educational, medical, vocational, or other personal characteristics.

In looking first, therefore, at the nature and circumstances of the offense, the Court agrees that everyone has a right to maintain their innocence. That's fine. The Defendant had a fair trial, represented by superior counsel, and can still to this day maintain his innocence.

But when the Court looks at the seriousness of the offense, it's not—well, it will take into account the deleterious and negative impacts that drugs have on the community. It's destroying our community. One of the addresses given in one of these Exhibits was that the Defendant lived at 1117 West Wind Lake, or thereabouts. Near south stadium. I remember as a boy in high school playing football at south stadium. My mother and my father, they'd come down and watch me at south stadium. I played for Riverside. And they'd take the bus down there. Because my Dad didn't have a car. And now people are afraid to go into that neighborhood. Because of what? Gangs. And I will get to that later.

But one of the reasons that neighborhood is unsafe is because of the large amount of drugs that are floating around. The large amount of criminal activity, which destroys a neighborhood. It destroys an economy. Poverty doesn't destroy an economy, crime does. Crime creates poverty. Poverty is created by gangs, because they commit crimes. And I will get to that later.

But the distribution of drugs that the Defendant is found guilty of—he's legally a drug dealer. We talked about our Democracy and it's a slap in the face of Democracy to say that a man can't maintain his innocence. It's a slap in the

face of Democracy when you violate the rules of Democracy after getting a fair trial, and then to insist with its overwhelming evidence that he's not guilty. The guy was found in a drug house. And Mr. Campos Ruiz, the guy I found to be an—almost an innocent bystander, a guy who truly worked hard all his life, was working 12 hour days, admitted to taking cocaine several years prior so he could work 12 hour days and take care of his sick brother. He saw you come down out of the attic. Heard the big clunk. No doubt in my mind that that was this press we're talking about. Run into the bathroom. Run the hot water. I know what was going on there. And I am going to make a finding that the drugs that Mr. Campos Ruiz saw you take into the bathroom are being flushed down the bathtub. And the jury already found you guilty of possessing over 500 grams, so that puts you in the five to 40-year range. So you're a drug dealer. First and foremost you're a drug dealer. Found guilty. Through due process of law. By a jury selected by your attorney, and the Government's attorney. And the Court has to deal with that first. And it's talking about that.

The circumstances of the offense. Not only does it have the overall negative deleterious impact on the community, this community, I should say, but it impacts what's happening in Mexico. It impacts what's happening internationally. Drugs are big money. And it's very attractive to get involved in this illicit enterprise.

Now, what is particularly egregious about this offense, it's not only your denial, but the denial of it when the Court looks at the history and circumstances of the offense and now segues into the history and characteristics of the Defendant. Establishes a pattern. And the pattern that it establishes is that you are a deceiver. A liar. And the Court makes that finding because you have been using Mr. Elizardo's identity since you have been here. And you fooled the Police a couple times when you came into

Chicago in March of '98 on an airline ticket. Guy's got an eighth-grade education from Mexico. Flies in on an airline ticket. And he's sent back. And he's sent back because Mr. Elizardo doesn't have the appropriate papers.

Now, you were here before that, and you were told not to come back. We have these reports. Right here. June 21st, 1998. Three months after you were sent out of this country you were arrested. For carrying concealed weapon. Dismissed. But it's proof that you were back in this country. You just laughed at the law. You just disregarded the law. The authorities in this country told you, you can't be here. And you just came back. And you came back under Mr. Elizardo, lying to the system. Lying to the Police. And then when you get arrested in June of 2000, Mr. Elizardo pops up.

Your employment is done under Mr. Elizardo. That's why that's sketchy. And then you scoff at the system again, and say these laws don't apply to me. So not only are you a liar, because you lied to the Police on that occasion again, but you also are a scofflaw. That is, you don't care about the laws of this country. You operate under a different system. All of this is what that tells me about you, Mr. Vasquez. And I have been sitting on the bench for 31 years, and I have seen countless Defendants. It's always the same thing when you have a person who can't tell the truth. You can't believe a thing that they say.

And so when I look at this presentence report and you say, well, yeah, I was a member of the gang from '94 to '97, and you know when you look at that presentence report it indicates that you were in the hospital in '97 because you got shot in the head, because as you say someone stole your car, neighbor stole your car, and you went after them, I can't believe that. The inference that I would draw is that you were a member of a gang and some other gang shot you in the head in some kind of a dispute. That's the

type of logical conclusion that you can draw from that. So anything that you say I can't believe. And the fact that I have got a picture here of—and I have seen a lot of these photos. I have seen a lot of gang photos, okay? This is a gang. And I am referring for purposes of the record to these attachments, C-5, et cetera. But in particular C-4. 11-29-03. Same as the other photos. There are differences in some of these photos.

The Police Officer, Officer Bohlen, was correct. There are certain physical characteristics that show aging. You can see that difference between the 5-17-96 booking photo, and the 6-21, two years later. Your face is fuller. That's a sign of age. Same guy. So Officer Bohlen is correct when he says yeah I know these photos are different. At different times. Because I have lived with these guys. It's my job. I investigate the Mexican posse. This guy is an expert on you guys.

So are you a member of a gang? Yeah. Or were you associated with it? Yeah. I mean; Officer Bohlen was asked on cross examination so what you do is you say it's gang related because you gather information, and come to a conclusion. Well, that's exactly what Officer Bohlen does. And all of this evidence comes to the same conclusion that he drew, and that is that you're an associate member of this gang. Which makes you very dangerous, because you're not only a liar, but now a gang member, or a gang associate. That's verified by the fact that when you were arrested in 2000, you were found with two gang members that Officer Bohlen identified. And this is 3 years after you told us in the presentence report that oh, yeah, I quit the gang in '97.

So when I look at the information that I have received, the valid information that I have received, the fact that you can come and go in this country—and I haven't even talked about the tapes. The Title III, which I think I

issued. And we can talk about language on those tapes. And again, I have seen a lot of tapes, a lot of drug deals, a lot of conversations. Yeah. Did you pick up my six shirts today? As if guys would call up and ask if they're going to pick up six shirts. Or did you pick up my golf balls? You know, the six-and-a-half golf balls that I ordered? Well, that might be a little too close to drugs, because you're talking about 8-balls. You might not want to use that terminology. But this is all drug talk. It's like a language all its own. It's clearly identifiable. There is no explaining it in any other terms. And it really distresses me, however, that you can't tell the truth. Because a free society functions on trust. And trust functions on truth. And you can't be trusted. And if you're a member of a gang and you can't be trusted, and you're a convicted drug dealer, all of these things make you, according to what I also have to consider under 3553, and that is not only the seriousness of the offense, but the deterrent effect this is going to have on you and the rest of the people who are similarly associated.

Now, the deterrent effect. The law hasn't had any deterrent effect, because you were an absconder, in that you didn't show up for your sentence after you were found guilty or pled guilty. And given 6 months work release. You were an illegal. And are an illegal. Told not to come back in this country, and you show up three months later. And then get arrested. A total and complete disregard for the law. You know, and there are Americans dying in Iraq to establish what we have in this country, the rule of law. And Abraham Lincoln said no one must violate the law, and the least in particular. Because that's the way a free society functions. And anyone who operates inapposite to that, the way you have, is someone who is a danger.

And that leads me to the third part that I consider under 3553, and that is the protection of the public. What is going to protect the public here? You have to be separated from the public. Because a short sentence and a deporta-

tion means, according to this history—and let me add here that the best gauge of how someone behaves in the future is how they behaved in the past. That's the hallmark of any Judge's decision. And given the fact that you don't have any concern for going—moving in and out of the country, a shorter sentence means that you're going to be back here.

Now the last factor. Defendant's medical, educational, vocational, psychological and, as the Statute says, other correctional treatment. Well, nothing herein that I see is significant, as compared with the other factors that the Court has discussed. And that is the need for the sentence to reflect the seriousness of the offense, the deterrent effect, and the protection of the public.

When I was sitting on the State bench in the old days I had the discretion to sentence the maximum. And if I wasn't constrained by the sentencing guidelines, or restrained by the sentencing guidelines, you'd get a much longer sentence than I am going to impose. And I am going to sentence you to 120 months. I think that's a reasonable sentence the way the Seventh Circuit would interpret it, given all that I said.

Credit for time served. That's as to Count 2. And Count 1 the Court will impose a 63 month sentence, which was the recommendation pursuant to the guidelines. 24 months, which is the statutory maximum, on Count 3. Those have to run concurrent.

Any credit that the Defendant has, he is to be credited for. Will be credited. And that will be decided by the Bureau of Prisons.

The Court is going to impose a $10,000 fine. Will not waive the interest on the fine. Order participation in the Bureau of Prisons Inmate Financial Responsibility Program. Place the Defendant on supervised release for a

period of three years as to Count 1, four as to Count 2, and one as to Count 3. All to run concurrent, for a total term of 4 years.

And while on supervised release the Defendant has to follow certain conditions of supervised release. First and foremost to report to the Bureau of—to the Probation Office in the District in which he is released. Upon release from the Bureau of Prisons. Not posses any firearms or dangerous weapons. Not use any controlled substances or possess any controlled substances illegally. Cooperate with ICE, the Bureau of Immigration and Customs Enforcement. Not associate in any way, shape, or form, through writing, communication, any communication—that includes writing, sign language—with any member, prospect or associate member of the Mexican Posse gang or any other gang. That means no communication whatsoever. I will recommend to the Bureau of Prisons that he not be placed at a facility with fellow members.

Cooperate with the provision of a D.N.A. sample under the guidance and supervision of the supervising Probation Officer. Participate in a program of testing for residential or outpatient treatment for drug or alcohol abuse as directed by the supervising Probation Officer. Pay any child support that may be due and owing. In other words, cooperate with the Child Support Enforcement Unit. Pay the $100 mandatory special assessment on each of these counts for a total of $300. That's payable in Room 362 of this building, Clerk of Court's Office.

The Court having rendered its disposition, is there any question as to the Court's disposition from the Government?

MS. MORENO-TAXMAN: No, Your Honor.

THE COURT: Any from the defense, Mr. Steinle?

MR. STEINLE: No, Judge.

THE COURT: Mr. Vasquez, have you any question about what the Court did here today?

THE DEFENDANT: No, Your Honor.

THE COURT: Then I must advise you of your appeal rights. You have 10 days to appeal this. If you can't afford an appeal, a Notice of Appeal will be filed on your behalf by the Clerk of Courts. And, Mr. Steinle, you will remain of counsel if there is an appeal?

MR. STEINLE: I will, Judge.

AO 2458 (Rev. 12/03)
Judgment in a Criminal Case Sheet 1

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

**AMENDED JUDGMENT IN A CRIMINAL CASE**

UNITED STATES OF AMERICA

v.

ARTURO OROZCO- VAZQUEZ

Case Number: 05-Cr-87

USM Number: 07740-089

Michael J. Steinle
Defendant's Attorney

Karine Moreno-Taxman/Elizabeth Blackwood

Assistant United States Attorney
Attorney

THE DEFENDANT:

X pleaded guilty to count(s) **One (1) and Three (3) of the Indictment.**

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) **Two (2) of the Indictment** after a plea not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| | See page 2 | | |

The defendant is sentenced as provided in Pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ The Indictment ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and the United States attorney of material changes in economic circumstances.

**September 23, 2005**

Date of Imposition of Judgment

**Rudolph T. Randa**

Signature of Judicial Officer

**Hon. Rudolph T. Randa, Chief Judge**

Name & Title of Judicial Officer

**10/5/05**

Date

AO 2458 (Rev. 12/03) Judgment in a Criminal Case:
Sheet 1A

Defendant: **Arturo Orozco-Vazquez**

Case Number: **05-Cr-87**

## ADDITIONAL COUNTS OF CONVICTION

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 922(g)(5) | Alien in Possession of Firearm | June 10, 2000 | 1 |
| 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2 | Possession with Intent to Distribute in Excess of 500 grams of Cocaine | November 23, 2004 | 2 |
| 8 U.S.C. §1326(a) | Illegal Re-Entry | February 28, 2005 | 3 |

0 2458 (Rev. 12/03) Judgment in a Criminal Case:

Sheet 2 - Imprisonment

Defendant: **Arturo Orozco-Vazquez**

Case Number: **05-Cr-87**

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **63 months as to Count One (1), 120 months as to Count Two (2), and 24 months as to Count Three (3). Terms to run concurrently for a total term of 120 months Imprisonment.**

Defendant shall be given credit for time served, if any, as determined/calculated by the United States Bureau of Prisons.

X The court makes the following recommendations to the Bureau of Prisons:

**Defendant be placed at a facility where fellow members of the Mexican Posse are not designated.**

X **The defendant is remanded to the custody of the United States Marshal.**

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

Judgment Page 3 of 7

AO 2458 (Rev. 12/03) Judgment in a Criminal Case:

Sheet 3 - Supervised Release

Defendant: Arturo Orozco-Vazquez

Case Number: 05-Cr-87

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years as to Count One (1), four (4) years as to Count Two 2 and 1 year as to Count Three (3). Terms to run concurrently for a total term of four (4) years Supervised Release.**

**The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.**

**The defendant shall not commit another federal, state or local crime.**

**The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.**

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

**X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)**

**X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)**

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and

meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such

notification and to confirm the defendant's compliance with such notification requirement.

Judgment Page 5 of 7

AO 245B (Rev. 12/03) Judgment in a Criminal Case:

Sheet 3A - Supervised Release

Defendant: **Arturo Orozco-Vazquez**

Case Number: **05-Cr-87**

**ADDITIONAL SUPERVISED RELEASE TERMS**

1. The defendant is to participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as approved by the supervising probation officer, until such time as he is released from such program by the supervising probation officer. The defendant is to refrain from use of all alcoholic beverages throughout the period of this supervision. The defendant shall pay the cost of this program under the guidance and supervision of the supervising probation officer.

2. The defendant shall not associate with any member, prospect or associate member of the Mexican Posse gang or any gang. The defendant shall have no communication whatsoever with the Mexican Posse gang or any gang.

3. The defendant is to pay the fine at a rate of no less than $50.00 per month. The defendant will also apply 100% of his yearly federal and state tax refunds toward payment of the fine. The defendant shall not change exemptions without prior notice to the supervising probation officer.

4. The defendant is to cooperate with Immigration and Customs Enforcement under the guidance and supervision of his supervising probation officer.

5. The defendant is to cooperate with Child Support Enforcement Unit in payment of any child support or arrearages and to make regular payments at the direction of the supervising probation officer.

Judgment Page 6 of 7

AO 2458 (Rev 12/03) Judgment in a Criminal Case:

Sheet 5 - Criminal Monetary Penalties

Defendant: **Arturo Orozco-Vazquez**

Case Number: **05-Cr-87**

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **Totals:** | **$300.00** | **$10,000.00** | **$** |
| | | Interest on the Fine is *not* waived | |

☐ The determination of restitution is deferred until_____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §

3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|

**Totals:** $ ____ $ ____

☐ Restitution amount ordered pursuant to plea agreement $ ____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Judgment Page 7 of 7

AO 245B (Rev 12/03) Judgment in a Criminal Case:

Sheet 6 - Schedule of Payments

Defendant: **Arturo Orozco-Vazquez**

Case Number: **05-Cr-87**

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $_____ due immediately, balance due

☐ not later than , or

☐ in accordance with ☐ C, ☐ D, ☐ E or ☐ F below; or

B X **Payment to begin immediately** (may be combined with ☐ C, ☐ D, ☐ E or ☐ F below); or

C ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ over a period of ____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ _____over a period of ____( e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

**Defendant shall participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program not to exceed 50% of his earnings. Payments shall apply first to the Special**

**Assessment and thereafter to the Fine until paid in full.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the

following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245B (Rev 12/03) Judgment in a Criminal Case:
Attachment (Page 1) - Statement of Reasons

**Defendant: Arturo Orozco-Vazquez**

**Case Number: 05-Cr-87**

**District: Eastern District of Wisconsin**

## STATEMENT OF REASONS

**(Not for Public Disclosure)**

☐ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATION WITHOUT CHANGE.

**OR**

☐ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES: (Use Page 3, if necessary):

- ☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level or specific offense characteristics):
- ☐ **Chapter Three of the U.S.S.G. Manual** adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):
- ☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS** (including comments, or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it, makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in, the presentence report.) (Use Page 3, if necessary.)

**GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):**

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: 2 to 3 years (Count 1)

Supervised Release Range: 4 to 5 years (Count 2)
Supervised Release Range: 1 year (Count 3)

Fine Range: $ 12,500.00 to $ 2,000,000.00

☐ Fine waived or below the guideline range because of inability to pay.

☐ THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.

**OR**

☐ THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THE FOLLOWING REASONS: (Use Page 3, if necessary.)

A0 245B (Rev 08/03) Judgment in a Criminal Case:
Supplemental Statement of Reasons

**Defendant: Arturo Orozco-Vazquez**

**Case Number: 05-Cr-87**

**District: Eastern District of Wisconsin**

## SUPPLEMENTAL STATEMENT OF REASONS

## APPLICABILITY OF THE FEDERAL SENTENCING GUIDELINES

(Not for Public Disclosure)

☐ The court applied the Guidelines and all relevant enhancements in this case.

☐ The court found the Guidelines unconstitutional in part, and imposed a sentence in accordance with the constitutionally applied portions of the Guidelines.

☐ The court did not apply the federal sentencing guidelines at all in this case and imposed a discretionary sentence.

X **The court took some other action** (Please explain below.):

**The Court granted the Government's motion for an upward departure and the sentence was imposed for the following reasons:**

**(1) The defendant was arrested after having been deported to Mexico and he is now in this Country illegally;**

**(2) The defendant is a deceiver/liar (he used someone else's identity to re-enter this Country and continued to use that identity being arrested under that name several times and not making the authorities aware of it when arrested for the case at bar);**

**(3) The defendant is a large scale drug dealer but he continues to deny it; the defendant was found guilty by a jury to having possessed over 500 grams of cocaine;**

**(4) The defendant deliberately lied to the Court. The defendant's claim that he is no longer a member of the Mexican Posse is false;**

**(5) The defendant is not supporting his children;**

**(6) The defendant's lack of work history.**

☐ This judgment includes an alternative sentence.

AO 245B (Rev 12/03) Judgment in a Criminal Case:
Attachment (Page 2) - Statement of Reasons

**Defendant: Arturo Orozco-Vazquez**

**Case Number: 05-Cr-87**

**District: Eastern District of Wisconsin**

**STATEMENT OF REASONS**
**(Not for Public Disclosure)**

**RESTITUTION DETERMINATIONS**

Total Amount of Restitution: $ _____

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable, victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues, of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need, to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not, ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(l)(B)(ii).

☐ Restitution is not ordered for other reasons:

☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

**DEPARTURE (Check all that apply)**

☐ The sentence departs below the guideline range for the following reasons; or

☐ The sentence departs above the guideline range for the following reasons:

**Pursuant to a Plea Agreement**

☐ based on 5Kl.l motion of the government based on the defendant's substantial assistance;

☐ based on a government motion pursuant to an early disposition program;

☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);

☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or

☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason.

**Pursuant to a Motion Not Addressed in a Plea Agreement**

- ☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;
- ☐ pursuant to a government motion based on the below reason for departure; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has objected.
- ☐ Other than plea agreement or motion by the parties based on the below reason for departure.

**Reason(s) for Departure**

- ☐ 4A1.3 Criminal History Adequacy (explain)
- ☐ 5K2.0 Aggravating or Mitigating Circumstances (explain):
- ☐ 5K2.1 Death
- ☐ 5K2.2 Physical Injury
- ☐ 5K2.3 Extreme Psychological Injury
- ☐ 5K2.4 Abduction or Unlawful Restraint
- ☐ 5K2.5 Property Damage or Loss
- ☐ 5K2.6 Weapons and Dangerous Instruments
- ☐ 5K2.7 Disruption of Government Function
- ☐ 5K2.8 Extreme Conduct
- ☐ 5K2.9 Criminal Purpose

- ☐ 5K2.10 Victim's Conduct
- ☐ 5K2.11 Lesser Harm
- ☐ 5K2.12 Coercion and Duress
- ☐ 5K2.13 Diminished Capacity
- ☐ 5K2.14 Public Welfare
- ☐ 5K2.16 Voluntary Disclosure of Offense
- ☐ 5K2.17 High-Capacity Semiautomatic Firearm
- ☐ 5K2.18 Violent Street Gang
- ☐ 5K2.20 Aberrant Behavior
- ☐ 5K2.21 Dismissed and Uncharged Conduct
- ☐ 5K2.22 Age or Health of Sex Offenders
- ☐ 5K2.23 Discharged Terms of Imprisonment
- ☐ 5K3.1 Early Disposition, "fast-track" Program

Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11)(explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)

AO 245B (Rev 12/03) Judgment in a Criminal Case:
Attachment (Page 3) - Statement of Reasons

**Defendant: Arturo Orozco-Vazquez**

**Case Number: 05-Cr-87**

**District: Eastern District of Wisconsin**

STATEMENT OF REASONS

(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES

(If necessary.)

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS

(If necessary.)

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT

(If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE

(If necessary.)

Defendant's Soc. Sec. No.: 465-23-5186

**September 23, 2005**
Date of Imposition of Judgment

Defendant's Date of Birth: 11/15/1973

Defendant's Residence Address:
In Custody

_____
Signature of Judge

Defendant's Mailing Address:
1813 North 3rd Street
Milwaukee, Wisconsin 53204

**Hon. Rudolph T. Randa**
Name and Title of Judge

10/5/05
Date Signed

**In the**
**United States Court of Appeals**
**For the Seventh Circuit**

No. 05-3920

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

ARTURO OROZCO-VASQUEZ,

*Defendant-Appellant.*

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 05 CR 87-Rudolph T. Randa, *Chief Judge.*

ARGUED MAY 5, 2006-DECIDED DECEMBER 5, 2006

Before KANNE, WOOD, and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge.* Arturo Orozco-Vasquez pleaded guilty to being an illegal alien in possession of a firearm in violation of 18 U.S.C. § 922(g)(5) and illegal reentry in violation of 8 U.S.C. § 1326(a), and then went to trial on a third charge of possession with intent to distribute more than 500 grams of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). The jury found him guilty and the chief district judge sentenced him to a prison term of 120 months (concurrent with terms of 63 and 24 months on the gun and illegal reentry counts). This was

42 months more than the high end of the advisory sentencing guidelines range of 63-78 months. Orozco-Vasquez appeals his conviction and sentence. He claims there was insufficient evidence to convict him and that the chief judge made erroneous factual findings that led to an unreasonable sentence.

We affirm. The evidence against Orozco-Vasquez on the drug count was plentiful and strong, easily enough to support the conviction. We also have no difficulty concluding that Orozco-Vasquez' s above-guidelines sentence is reasonable. To the extent that Orozco-Vasquez attacks the fact-finding underlying the chief judge's upward variance, the effort is misplaced. There is a difference between formal factual findings and judicial observations that explain conclusions about sentencing factors, and Orozco-Vasquez has confused the two.

## I. Background

Late one November night in 2004, several Milwaukee police officers went to a duplex on the south side of the city acting on a tip that Orozco-Vasquez-wanted on an outstanding warrant for failing to report for a prior sentence-was in the house. Officer Todd Bohlen knocked on the back door of the duplex. Fernando Campos-Ruiz (who became a codefendant in this case) came out onto a porch off the upstairs unit and asked who was knocking. When the police identified themselves, Campos-Ruiz went back inside. Moments later a young girl from the downstairs unit let the officers into the common hallway and directed them to the upstairs unit. Some officers waited outside the duplex, taking up positions around the property. As Bohlen and his partner climbed the stairs to the upper unit, officers outside shouted that items were being thrown from the upper unit. Those items, it turns out, were

250-gram balls of cocaine. Bohlen knocked on the door of the upper apartment, announcing his presence forcefully. He heard people scrambling around inside and the sound of a heavy object being dropped. After calling for backup, Bohlen made a forced entry.

Bohlen entered the apartment and heard the sound of "[w]ater blasting out of a tub faucet." Orozco-Vasquez emerged from the bathroom with his hands up, soaking wet and fully dressed. He left the tub faucet on, blasting hot water, with the drain open. Bohlen immediately noticed the strong odor of cocaine in the bathroom. In a bedroom directly across the hall from the bathroom, officers found an electronic scale, a knife with cocaine residue, two bottles of inositol (a cocaine cutting agent), a roll of plastic wrap, a box of dryer sheets, a roll of gray duct tape, and a ball of cocaine wrapped in duct tape. Orozco-Vasquez's fingerprints were found on the scale and one of the bottles of inositol. From outside the duplex, officers recovered three balls of cocaine, all wrapped in either duct tape or masking tape, and one wrapped with a dryer sheet under the tape. The cocaine in all three packages was cut with 50-60% inositol. Officers also found cocaine in the kitchen and a cocaine press designed to press ½ - or 1 - kilogram bricks of cocaine in the attic. In all, police recovered at least four packages of cocaine weighing 250 grams each.

Based on the foregoing evidence, the jury convicted Orozco-Vasquez on the drug count (as we have noted, he entered guilty pleas to being an illegal alien in possession of a firearm and illegal reentry after removal). The sentencing guidelines recommended a sentence of 63-78 months, but Chief Judge Randa did not think that sentence long enough. The chief judge explicitly considered several of the factors in 18 U.S.C. § 3553(a), including the nature and circumstances of the offense, the history and characteristics

of the defendant, and the need for deterrence and protection of the public.

The chief judge rejected Orozco-Vasquez's claim that he was an innocent bystander in a drug house rather than a large-scale drug dealer and long-standing member of the Mexican Posse street gang, as the government maintained. Beyond the trial evidence and the jury's verdict, the chief judge pointed to the government's presentation at sentencing of earlier, unrelated wiretapped conversations in which Orozco-Vasquez is heard using language the judge recognized as coded drug trafficking lingo. The chief judge also entered what he characterized as "a finding" that "the drugs that Mr. Campos-Ruiz saw you take into the bathroom [were] . . . flushed down the bathtub." This was a reference to a statement in the Presentence Report that Campos-Ruiz reported seeing Orozco-Vasquez enter the bathroom and come out soaking wet.

Chief Judge Randa also rejected Orozco-Vasquez's claim that he left the Mexican Posse in 1997, citing Orozco-Vasquez's concealed weapons arrest in 2000 while he was in the company of two members of the Mexican Posse, as well as several photographs in which Orozco-Vasquez is seen flashing gang signs with several other members of the Mexican Posse as late as 2003. The chief judge was likewise skeptical about Orozco-Vasquez's explanation of an injury he sustained in 1997 when he was shot in the head. According to Orozco-Vasquez, his neighbor stole his car, and when Orozco-Vasquez went after the neighbor, he was shot in the head. Based on Orozco-Vasquez's acknowledged Mexican Posse membership in 1997, the chief judge thought it more likely that Orozco-Vasquez was shot in the head as a result of some gang-related activity.

Overall, the chief judge's impression was that Orozco-Vasquez was a "deceiver," a "liar," and a

"scofflaw," and he doubted that anything Orozco-Vasquez said could be believed. The chief judge cited Orozco-Vasquez's use of an alias to elude law enforcement as evidence of his deceptive nature. He also noted Orozco-Vasquez's history of illegal reentries into this country using a false name and the fact that Orozco-Vasquez has violated the law several times and failed to report for a six-month work-release sentence on the state concealed weapons offense (this was the warrant that brought the police to the duplex looking for Orozco-Vasquez).

The chief judge also discussed the need for the sentence to promote respect for the law, protect the public, and deter Orozco-Vasquez from breaking the law again. Because of his pattern of illegal entries into this country, efforts to elude law enforcement by use of an alias, repeated crimes, and failure to report for the prior work-release sentence, Chief Judge Randa concluded that the law has had little deterrent effect on Orozco-Vasquez. Based on the foregoing, the chief judge stated that a short sentence followed by deportation presented too great a risk that Orozco-Vasquez would again illegally re-enter and resume drug dealing. The chief judge sentenced Orozco-Vasquez to 120 months in prison on the drug count and concurrent terms of 63 and 24 months, respectively, on the gun and illegal reentry counts.

## II. Discussion

### A. Sufficiency of the Evidence

Orozco-Vasquez argues there was insufficient evidence to find him guilty beyond a reasonable doubt of possession with intent to deliver over 500 grams of cocaine. Insufficiency of the evidence arguments are hard to win. *See, e.g., United States v. Moore*, 425 F.3d 1061, 1072 (7th Cir. 2005) (calling the hurdle "

'nearly insurmountable' " (quoting *United States v. Frazier*, 213 F.3d 409, 416 (7th Cir. 2000)). We do not weigh the evidence or assess the credibility of witnesses. Instead, we view the evidence in a light most favorable to the government and reverse only when there is no evidence, no matter how it is weighed, from which a rational jury could find guilt beyond a reasonable doubt. *United States v. Johnson*, 437 F.3d 665, 674 (7th Cir. 2006).

To convict Orozco-Vasquez under 21 U.S.C. § 841(a)(1), the government had to prove that he "(1) knowingly or intentionally possessed cocaine (2) with the intent to distribute it (3) while knowing it was a controlled substance." *United States v. Starks*, 309 F.3d 1017, 1022 (7th Cir. 2002). Orozco-Vasquez challenges only whether he possessed cocaine, arguing that the evidence does not support the jury's verdict that he did. He maintains that since the government did not catch him cocaine-in-hand, it has not established possession.

The government need not show actual possession to convict Orozco-Vasquez; constructive possession will suffice. *Id.* The government can prove constructive possession by showing Orozco-Vasquez had the authority to possess and determine the disposition of the drugs. *United States v. Harris*, 325 F.3d 865, 869 (7th Cir. 2003); *Starks*, 309 F.3d at 1022. Constructive possession need not be exclusive so long as there is a nexus between the defendant and the drugs. *Harris*, 325 F.3d at 869.

The government introduced sufficient evidence from which a rational jury could find possession. The police caught Orozco-Vasquez very nearly red-handed. As Officer Bohlen entered the apartment, Orozco-Vasquez emerged from the bathroom fully dressed but soaking wet. The drain on the tub was wide open, and hot water remained running as Orozco-Vasquez came out. Officer Bohlen described

the strong odor of cocaine in the bathroom. Bohlen also testified that in his experience as a narcotics officer, suspects often try to flush cocaine down drains with hot water because hot water dissolves cocaine faster than cold.

The apartment was littered with trappings of the cocaine trade. Police found an electronic scale and a bottle of inositol bearing Orozco-Vasquez's fingerprints. Near those items police recovered a knife with cocaine residue on it, a roll of plastic wrap, a roll of gray duct tape, a box of dryer sheets (used to suppress the smell of wrapped cocaine), and a ball of cocaine wrapped in gray duct tape. In the attic of the apartment, police found a cocaine press designed to press ½ - and 1 -kilogram bricks of cocaine.

Officers also recovered three balls of cocaine they witnessed being thrown from the windows of the apartment when they arrived-two wrapped in gray duct tape. All three balls of cocaine weighed about 250 grams and contained 50-60% inositol; at least one of the balls of cocaine was lined with a dryer sheet. Taken with its reasonable inferences, this evidence is sufficient for a jury to find constructive possession and to find Orozco-Vasquez guilty beyond a reasonable doubt.

**B. Sentencing**

Chief Judge Randa sentenced Orozco-Vasquez to 120 months in prison because he concluded the guidelines range of 63-78 months was insufficient. Since *United States v. Booker,* 543 U.S. 220 (2005), we review sentences for reasonableness. *Id.* at 260-61. Sentences within the properly calculated advisory guidelines range are presumed reasonable. *United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir. 2005). Sentences outside the guidelines range, however, are

entitled to no presumptions; they will be affirmed as reasonable if the sentencing judge articulates appropriate supporting justification under the sentencing factors specified in 18 U.S.C. § 3553(a). *United States v. Cunningham,* 429 F.3d 673, 675 (7th Cir. 2005); *United States v. Johnson,* 427 F.3d 423, 427 (7th Cir. 2005). The more the sentence varies from the guidelines range, the more compelling the justification must be. *United States v. Dean,* 414 F.3d 725, 729 (7th Cir. 2005).

Orozco-Vasquez challenges the reasonableness of his sentence by arguing that the chief judge based it on erroneous factual findings. Explicit findings on the facts that influence the decision to sentence outside the guidelines range are not required unless a particular fact is contested and central to the district judge's choice of sentence. *Johnson,* 427 F.3d at 427; *Dean,* 414 F.3d at 730. Factual findings are reviewed the same way as before *Booker-for* clear error. *United States v. Robinson,* 435 F.3d 699, 701 (7th Cir. 2006). Factual findings are clearly erroneous only if we are firmly convinced after we review all of the evidence that a mistake has been made. *United States v. Wilson,* 437 F.3d 616, 621 (7th Cir. 2006).

Orozco-Vasquez argues that several of Chief Judge Randa's statements during sentencing constitute clearly erroneous "factual findings." Specifically, he challenges: 1) the chief judge's "finding" that "the drugs Mr. Campos-Ruiz saw [Orozco-Vasquez] take into the bathroom [were] being flushed down the bathtub"; 2) the chief judge's observation that Orozco-Vasquez used recognizable "drug language" in recorded conversations; 3) the chief judge's comment that Orozco-Vasquez's 1997 gunshot wound was more likely attributable to a gang-related incident than a car theft; and 4) the chief judge's remark that Orozco-Vasquez did not report to serve a six-month

work-release sentence for a state concealed weapons conviction.

We note preliminarily that not every fact-based statement a judge makes at sentencing is a "factual finding." Much of what a judge says in imposing and explaining a sentence consists of observations and assessments that form the basis of the judge's consideration of the § 3553(a) sentencing factors. Sentencing post-Booker requires the sentencing judge to properly calculate the advisory guidelines range in the same manner as before *Booker* and then to make a discretionary decision whether to sentence the defendant within the advisory range or outside it in light of the very broadly stated sentencing factors set forth in § 3553(a). *Robinson,* 435 F.3d at 700-01; *Cunningham,* 429 F.3d at 675-76. The second step is an evaluative process by which the judge considers the particular statutory factors that inform the sentence he has decided to impose. We have held that the "duty to consider the statutory factors is not a duty to make findings." *Dean,* 414 F.3d at 729-30. Judicial observations about such factors as the nature and seriousness of the offense, § 3553(a)(1) and (2)(A), the characteristics of the defendant, § 3553(a)(1), and the need to protect the public, § 3553(a)(2)(C), are not "facts" requiring "findings," as when the judge calculates the guidelines range. As we have noted, only where a particular fact is contested and "decisive to the choice of sentence" must there be explicit fact-finding to support the judge's exercise of sentencing discretion.

In this case the chief judge examined the nature and circumstances of Orozco-Vasquez's crimes, his history and characteristics, and the need to protect the public from further crimes-just as § 3553(a) directs. The chief judge characterized Orozco-Vasquez as a large-scale drug dealer, a liar, and a scofflaw for whom the law and previous punishment

had served as no deterrent. The judge noted that Orozco-Vasquez stood convicted of possession with intent to distribute a significant amount of cocaine, that he flushed cocaine down the bathtub drain in an effort to destroy the evidence, and that he was heard using recognizable drug code language in wiretapped conversations.

Orozco-Vasquez first assigns error to the chief judge's "finding" (that is how the judge characterized it) "that the drugs Mr. Campos-Ruiz saw [Orozco-Vasquez] take into the bathroom [were] being flushed down the bathtub." It is true that Campos-Ruiz did not say he saw Orozco-Vasquez take drugs into the bathroom, only that he saw him go into the bathroom and come out soaking wet. But the thrust of the chief judge's comment was that Orozco-Vasquez was caught in the act of destroying the cocaine evidence-a point that is beyond dispute on this record. Even if the chief judge mistakenly "found" that Campos-Ruiz saw Orozco-Vasquez take drugs into the bathroom, the error was clearly harmless.

The chief judge's observation that Orozco-Vasquez used coded drug lingo in the wiretapped conversations was directed at Orozco-Vasquez's claim to have been an innocent bystander in a drug house, not a significant drug dealer as the government maintained. An affidavit from a narcotics officer that accompanied the transcript of the taped conversations identified the passages in question as "possible" or "probable" drug references. The chief judge said he had heard coded "drug talk" like this many times before. This was not a factual finding. It was, instead, part of the chief judge's explanation for his rejection of Orozco-Vasquez's implausible assertion that he was not a large-scale drug dealer. Although we have cautioned district courts to be careful about equating the use or knowledge of drug slang with drug dealing, *see United States v. Harrison*, 431 F.3d 1007, 1012 (7th Cir. 2005), the chief

judge's interpretation of the wiretapped conversations was entirely reasonable in the context of the overwhelming evidence in this case.

Orozco-Vasquez also challenges the chief judge's comment that the 1997 shooting in which Orozco-Vasquez was injured probably occurred during a gang-related incident rather than an auto theft. Once again, this comment must be considered in its context, that is, as part of the chief judge's explanation for characterizing Orozco-Vasquez as a liar and a long-standing member of the Mexican Posse. After citing the reasons he felt Orozco-Vasquez could not be believed-his illegal reentries, use of a false name, denial of drug connections and continuous Mexican Posse membership despite very strong evidence to the contrary-the chief judge said there was reason to doubt everything Orozco-Vasquez had to say. The chief judge then explained that he could not believe Orozco-Vasquez's story about being shot in the head by a neighborhood car thief; the judge thought the more reasonable inference was that the shooting occurred during some sort of gang dispute. The chief judge's take on Orozco-Vasquez's story was not a factual finding. Rather, it was an expression of the judge's extreme skepticism about Orozco-Vasquez's credibility.

Finally, Orozco-Vasquez attacks the chief judge's comment that he was an "absconder" who "didn't show up" to serve his work-release sentence on the state gun conviction. He argues that the record is silent on the matter of whether he ever actually served the sentence, so the chief judge's "finding" that he "failed to serve" the sentence is clearly erroneous. This argument misses the point. The chief judge's comment came as he was explaining why he thought the law had not had a sufficient deterrent effect on Orozco-Vasquez. There is no dispute that a warrant was issued for failure to report for this sentence, and the chief judge thought this demonstrated "total and complete disregard for the

law," in combination with Orozco-Vasquez's illegal reentries and use of an alias. Orozco-Vasquez does not argue explicitly that he *did* serve this sentence and that the warrant was issued in error. The chief judge's assessment that Orozco-Vasquez had shown habitual disrespect for the law was hardly unreasonable.

Beyond the foregoing misplaced claims of erroneous "fact-finding," Orozco-Vasquez has not argued that his above-guidelines sentence was otherwise unreasonable. Sentences above or below the guidelines range are reasonable so long as the district judge provides satisfactory justification, consistent with the factors in § 3553(a), for varying from the range. *Johnson*, 427 F.3d at 426. Though he need not have run through the § 3553(a) factors like a checklist, *see Dean*, 414 F.3d at 729, Chief Judge Randa commendably structured his sentencing comments around the specific factors listed in § 3553(a), which makes review for reasonableness easier. The chief judge made a compelling case for giving Orozco-Vasquez a lengthier sentence than the guidelines recommended. Orozco-Vasquez was dealing cocaine in significant quantities, has shown chronic disrespect for the law, and his previous punishment has had little or no effect on his behavior. He has entered the country illegally and been removed, only to reenter illegally again. He has a history of gun possession and did not report to serve a six-month sentence for possession of a concealed weapon. Under these circumstances, it was not unreasonable for the chief judge to think a longer sentence was required to deter Orozco-Vasquez from further crimes and to protect the public.

Orozco-Vasquez's conviction and sentence are AFFIRMED.